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Thesis Painting, Inc. and International Union of Painters and Allied Trades, AFL-CIO, District Council 51. Case 05-CA-172905

July 20, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on March 30, 2016, by International Union of Painters and Allied Trades, AFL-CIO, District Council 51 (the Union), the General Counsel issued the complaint on April 28, 2016, alleging that Thesis Painting, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union's certification in Case 05-RC-155713. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On May 24, 2016, the General Counsel filed a Motion for Summary Judgment. On May 25, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its objections in the underlying representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate*

Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.¹

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Springfield, Virginia (the facility) and has been engaged in the business of providing commercial painting services.

During the 12-month period preceding March 31, 2016, the Respondent, in conducting its operations described above, performed services valued in excess of \$50,000 in states other than the Commonwealth of Virginia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on July 31, 2015, the Union was certified on November 2, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All full-time and regular part-time painters and lead painters employed by the employer.

EXCLUDED: All estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

¹ The Respondent argues that this complaint constitutes improper piecemeal litigation under *Jefferson Chemical Co.*, 200 NLRB 992 (1972), in view of the amended complaint in Case 05-CA-167137. We reject this argument.

The Board has made clear that [*Jefferson Chemical*] is policy-based, not jurisdictional, and is limited to those instances when the General Counsel attempts to litigate "the same act or conduct as a violation of different sections of the Act" or relitigates the "same charges in different cases."

NLRB v. Community Health Services, Inc., 483 F.3d 683 (10th Cir. 2007), quoting *Service Employees Union, Local 87 (Cresleigh Management, Inc.)*, 324 NLRB 774 (1997). There is no evidence that the General Counsel here seeks to litigate the same conduct in two proceedings. See also *U-Haul Co. of Nevada*, 345 NLRB 1301, 1302 (2005) (holding separate litigation of test-of-certification complaint and complaint alleging discriminatory discharges and failure to bargain about effects of closing facility is within General Counsel's discretion, absent a showing of abuse of discretion or prejudice). In addition, we find that the Respondent's assertions that the complaint is not substantially justified within the meaning of the Equal Access to Justice Act and that the Respondent is entitled to an award of attorney's fees are without merit.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

On March 28, 2016, the Union requested in writing that the Respondent recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

Since March 28, 2016, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since March 28, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Thesis Painting, Inc., Springfield, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to recognize and bargain with International Union of Painters and Allied Trades, AFL-CIO, District Council 51 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDED: All full-time and regular part-time painters and lead painters employed by the employer.

EXCLUDED: All estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Springfield, Virginia, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 28, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. July 20, 2016

_____ Mark Gaston Pearce,	Chairman
_____ Kent Y. Hirozawa,	Member
_____ Lauren McFerran,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Union of Painters and Allied Trades, AFL-CIO, District Council 51 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

INCLUDED: All full-time and regular part-time painters and lead painters employed by the employer.

EXCLUDED: All estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

THESIS PAINTING, INC.

The Board's decision can be found at www.nlr.gov/case/05-CA-172905 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

